UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 02-78-P-C***
	)	
ZACHARY A. PARADIS,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

Zachary A. Paradis, charged with one count of being a felon in possession of a firearm (a .25 caliber Rigarmi semiautomatic pistol, serial number 1099_9) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); three counts of being a felon in possession of ammunition, also in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and one count of possession of a firearm on which the serial number had been altered (the same .25 caliber Rigarmi pistol), in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B), seeks to suppress (i) all evidence seized pursuant to a search warrant from an apartment at 6 Pine Street, Lewiston, Maine; (ii) a handgun seized during the search of this apartment; (iii) statements made by the defendant on July 3, 2002; and (iv) ammunition seized as a direct or derivative result of this search. Second Superseding Indictment (Docket No. 18); Defendant's Motion to Suppress Search Warrant, etc. (Docket No. 10); Defendant's Motion to Suppress Search of Residence, etc. (Docket No. 11); Defendant's Motion to Suppress Statements, etc. (Docket No. 12); Defendant's Supplemental Motion to Suppress, etc. (Docket No. 21).

An evidentiary hearing was held before me on January 9, 2003 at which the defendant appeared with counsel. The government called four witnesses and introduced three exhibits, which

were admitted without objection. The defendant testified and introduced one exhibit, which was admitted without objection. Post-hearing briefs were submitted by the government on January 21, 2003 and by the defendant on January 28, 2003. Based on the evidence adduced at the hearing and on my review of the search warrant, I recommend that the following findings of fact be adopted, that the motion to "suppress" the search warrant be denied and that the other motions be granted.

I. Proposed Findings of Fact

A. From the Search Warrant and Supporting Affidavit

On June 24, 2002 Auburn police officers Matthew Prince and Anthony R. Harrington, Jr. went to a second-floor apartment at 6 Pine Street in Auburn, known to them as the apartment of Danyelle Bell, girlfriend of the defendant, who is also known as "Pee Wee." The officers were looking for the defendant, for whom two active arrest warrants were outstanding. The officers heard the voices of several men through the door to the apartment. Harrington knocked and a female voice asked who was there. Harrington announced that it was the police department. The officers could hear rustling in the back room of the apartment. After about two minutes Bell came to the door and opened it only far enough so that the officers could see her. She was asked whether the defendant was there and replied that he was not. She appeared to be nervous. When asked, she said that the last time she had seen the defendant was about a month earlier. Bell had called the police on June 6, 2002 to report that the defendant was "flipping out" at her apartment. She had been assaulted by the defendant on March 30 and June 3, 2002. Approximately two weeks after the second assault she called the Auburn police to report that the defendant had taken her car.

Bell told Harrington that her new boyfriend was in the apartment. Harrington asked her to have him come to the door. Bell called to the back room for Josh to get dressed and come to the door. Joshua Benning, whom Harrington recognized, then came to the door. Benning denied knowing the

defendant. Harrington asked Bell if the officers could enter the apartment to make sure that the defendant was not there. Harrington told Bell that he wanted to be sure that she was safe and that, given the nature of her repeated calls to the police and her relationship with the defendant, Harrington thought that the defendant might be in the apartment. Maylon Bean, whom Harrington also recognized, then came to the door.

Bean told Harrington that Bell was his girl now and that the defendant was not there. He told Harrington that the officers would not be allowed into the apartment. While all three occupants were standing at the door, Harrington could still hear rustling in the back room of the apartment.

Lieutenant Roth then arrived and spoke to Bell in the hallway, explaining to her that if the defendant were found in her apartment she could be charged with harboring a fugitive. Bell grew more nervous. The lieutenant asked Bell to go into the apartment and ask the defendant to come out. Bell went into the apartment. Approximately five minutes later Benning left the apartment. There was loud rustling in the back room. A few minutes later Bell and Bean left the apartment and Bell locked the door. She told the officers they were leaving. Harrington told Bell that the officers would try to obtain a search warrant.

After all three occupants had left rustling could still be heard from the back room of the apartment. The officers did not know of any pets in the building and Bell had told Harrington that her child was not at home. While Prince remained at the door, Harrington walked outside and noticed that the lights in the apartment were still on. A male passerby said to Harrington "Trouble at Pee Wee's house again?" The passerby told Harrington that he had seen the defendant at the apartment of Chris White earlier that day. The officers checked that apartment with negative results.

No one left or returned to the apartment before the affidavit was presented to a justice of the peace. A warrant to search the apartment for the defendant was issued, based on Harrington's affidavit which is in evidence as Gov't Exh. 4.

B. From the Hearing

Officers Harrington and Prince of the Auburn Police Department went to the second-floor apartment of Danielle Bell at 6 Pine Street in Auburn at approximately 11:15 p.m. on June 24, 2002 to look for the defendant, known to them to be Bell's boyfriend, in order to arrest him on outstanding warrants for operating a motor vehicle after suspension of his license to do so, assault on a police officer and domestic assault. Harrington had arrested the defendant in February 2002, on which occasion the defendant had responded to the nickname "Pee Wee." The apartment had two doors into the hallway. The officers listened at the doors and, before knocking, heard multiple male voices in conversation, none of which they could identify. Harrington identified himself as an Auburn police officer and after a long pause Bell opened the door slightly.

Bell denied that the defendant was in the apartment but acted nervous, including glancing frequently back into the apartment. She stated that she had not seen the defendant in about a month; Harrington knew this to be false based on a report that she had made to the police department on June 6, 2002 that the defendant was "flipping out" in her apartment and a call that she had made to the police department on June 17, 2002 to report that the defendant had stolen her car. Two men, Joshua Benning and Maylon Bean, each eventually came to the door. Bell told the officers that Benning was her new boyfriend. Bean so identified himself when he came to the door. Bell refused to allow the officers to enter the apartment. Lieutenant Roth of the Auburn Police Department arrived in response to Harrington's call and informed Bell that she could be charged with harboring a fugitive if the defendant was in the apartment. He told Bell to go back into the apartment and tell the defendant to

come out. Bell closed the door. About five minutes later Benning came out of the apartment and left the building. A few minutes later Bell and Bean left; Bell locked the apartment door behind her. After they had left, the officers could still hear noises through the apartment door. Harrington went downstairs and walked outside the rear of the building in order to look at the apartment windows, where he could see that the lights were on in the apartment. A pedestrian walked by and said "Trouble at Pee Wee's house again" and told Harrington that he had seen the defendant at Chris White's apartment earlier that day. Leaving officer Gosselin in the apartment building, Harrington and Prince went to White's apartment but did not find the defendant there.

The officers prepared an affidavit (Gov't Exh. 4) and application for a search warrant which they then presented to a justice of the peace. The justice of the peace issued a search warrant (Gov't Exh. 3) which the officers then took back to the Pine Street apartment, where Gosselin had remained while the affidavit was obtained. Officer Bouchard joined the other officers at this time. After forcing entry into the apartment, the officers found the defendant lying under a mattress and box spring in the sole bedroom, which also contained piles of clothing and toys and a child's bed. Prince watched the outside of the building while the warrant was executed. After learning that the defendant had been located, Prince went into the apartment and passed Gosselin as Gosselin left the apartment to transport the handcuffed defendant to the county jail.

Just before the defendant was located under the bed, Roth noticed some ammunition on the entertainment center in the apartment's living room and commented on its presence. After the defendant was found, Roth directed the officers to conduct a small sweep in the area of the bed. Prince did not hear this directive. After entering the apartment, Prince passed Roth and Harrington in the living room and went into the bedroom. He noticed that the small bedroom was in disarray, with the mattress under which the defendant had been found propped up against the sloping ceiling and piles

of clothing and toys all around. Directly to the right of the door into the bedroom from the living room was a child's bed covered with clothing and toys. Prince reached down to push the child's bed out of the way because there was insufficient room between that bed and the adult bed to allow anyone to walk around in the room. As Prince moved the mattress on the child's bed, a mound of clothing fell off to the side and he could see the white handle of a pistol sticking out from under a stuffed animal.

Prince put on gloves and moved the stuffed animal. He could not tell whether the pistol was loaded by looking at it. He picked the gun up and found that there was no chambered round but six rounds had been inserted in the magazine.

On June 30, 2002 officer Hatfield of the Auburn Police Department, who knew that the defendant had been arrested on June 25, 2002, went to Bell's apartment in response to her call reporting that her car had been stolen. Bell told Hatfield that the defendant had stolen her car. Hatfield asked Bell whether she knew anything about the gun that had been seized in the apartment when the defendant was arrested. She told him that the gun belonged to the defendant, who had brought it into the apartment. She then presented Hatfield with a yellow box of .25 caliber ammunition which she said belonged to the defendant and told Hatfield that a bag of ammunition on the back porch at the first floor level of the building also belonged to the defendant. Hatfield took all of the ammunition to the police department evidence locker.

Hatfield met again with Bell on July 1, 2002 at the police department. At that time, she told him that she had purchased .22 caliber ammunition for the defendant at his request and that Jody Green had purchased .25 caliber ammunition for the defendant at his request.

The following information is taken from the affidavit of Christopher J. Durkin (Gov't Exh. 2) submitted in support of the criminal complaint that initiated this federal prosecution of the defendant. On July 2, 2002 Hatfield and the Central Maine Violent Crime Task Force obtained a warrant for the

arrest of the defendant on various state-law charges, including possession of a firearm by a felon. The defendant was arrested on this warrant on July 3, 2002. Special Agents Durkin and Saenz of the Bureau of Alcohol, Tobacco and Firearms then interviewed the defendant, who told them that: (i) he had purchased the firearm at issue in this action for $50 after his release from prison where he served a sentence for aggravated assault; (ii) he purchased the gun for Bell; (iii) the gun was a .25-caliber black pistol with a white handle and a broken firing pin; (iv) about two weeks after he purchased the gun Jody Green purchased some ammunition for it; (v) the gun was working and was not stolen; (vi) the gun was kept under the television or the couch except when Bell's child was present, when it was kept in the closet; (vii) ammunition for the gun was kept under the television; and (viii) his fingerprints might be found on the gun because he showed Bell how to load it. The serial numbers on the gun had been scratched. The first four numbers are 1099; the next number is illegible; the final number is 9.

The defendant testified that he was living in the apartment with Bell on June 24, 2002, that the child's bed in the apartment had metal bars on both sides so that it would have been impossible for the mattress to slip off the frame as Prince had testified and that an officer had told him after his arrest that they were sweeping the apartment for contraband. After he was bailed out following the June 25 arrest the defendant did not return to the Pine Street apartment. He testified that he bought the gun for Bell's protection and denied that he possessed it or had any ownership interest in the gun or the ammunition. On redirect, he testified that he paid $50 for the gun, fired it in order to test it, showed it to others, had access to it at any time and was involved in plans to purchase ammunition for it.

II. Discussion

A. Validity of the Search Warrant

The defendant contends that the search warrant is invalid in this case because the underlying affidavit shows that the officers had only a "mere hunch" that the defendant was in Bell's apartment; they could not determine that the defendant had been in the apartment since June 6, 2002, some 19 days earlier; the facts are subject to equally plausible interpretations other than the conclusion that the defendant was present in the apartment; the officers did not know the layout of the apartment and could not identify the "rustling" as being caused by a human being; and Harrington did not see any person through the apartment windows. Defendant's Motion to Suppress Search Warrant at [3]- [5].

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "The threshold for probable cause in a criminal case is low." *Suboh v. District Attorney's Office of Suffolk Dist.*, 298 F.3d 81, 96 (1st Cir. 2002). "Probable cause exists where information in the affidavit reveals a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Baldyga*, 233 F.3d 674, 683 (1st Cir. 2000). Probability is the touchstone of the inquiry. *Id*. Thus, the fact that explanations of the facts in the affidavit other than the presence of the defendant in the apartment may be plausible is irrelevant so long as the conclusion that the defendant was present is also plausible. Taken as a whole, the Harrington affidavit is neither conclusory nor vague; it is sufficient to establish a fair probability that the defendant was in the apartment. The additional specific information identified by the defendant as being absent from the affidavit would of course have been helpful to the magistrate and would have strengthened the officer's request for a search warrant, but it was not required. The motion to "suppress the search warrant" should be denied.

B. Motion to Suppress the Gun

The defendant contends that the search warrant executed by the officers at Bell's apartment on the night of June 24-25, 2002 was limited in scope to a search for his person, and that the seizure of the gun after he had been arrested and taken from the apartment was beyond the scope of the warrant and otherwise unlawful. Defendant's Motion to Suppress Search of Residence, etc. at 4-5; Defendant's Post-Hearing Response Brief ("Defendant's Post-Hearing Brief') (Docket No. 25) at 11-15. The government responds that the police "had a warrant to search Bell's apartment" and that the defendant had no reasonable expectation of privacy in the gun or the child's bed, depriving him of standing to seek suppression of the gun, Government's Post-Hearing Brief Regarding Defendant's Suppression Motions ("Government's Post-Hearing Brief") (Docket No. 24) at 9, 11-12; that the gun was in plain view and that the seizure of the gun was incident to a lawful arrest, Government's Objection to Defendant's Motions to Suppress (Docket No. 17) at 8-10.

To the extent that the government's reference to the search warrant is intended to suggest that the seizure of the gun was within the scope of the warrant, that position is unfounded. The warrant (Gov't Exh. 3) clearly identifies the "[p]roperty or article(s) to be searched for" as "Zachary 'Pee Wee' Paradis," and no one or nothing else. By all accounts, the officers had found the defendant and removed him from the apartment before the gun was found. The warrant itself provides no authority for the seizure of the gun.

The government's contention that seizure of the gun was warranted under the "plain view" exception to the requirement of a search warrant that by its terms authorizes a search for the discovered contraband also fails.

> To satisfy the "plain view" exception to the warrant requirement, the government must show that (1) the law enforcement agent was legally in a position to observe the seized evidence, and (2) the incriminating nature of the evidence was "immediately apparent" to the officer.

United States v. McCarthy, 77 F.3d 522, 534 (1st Cir. 1996) (citation omitted). To say that the officers were legally in the apartment due to their execution of the warrant for the defendant's person and that the incriminating nature of the gun was immediately apparent to Prince once it was revealed, as does the government here, Government's Post-Hearing Brief at 9, is not enough under applicable Supreme Court precedent, however. The officers must also "have a lawful right of access to the object." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Here, whether Prince revealed the gun accidentally, while moving the mattress of the child's bed in order to allow himself and other officers to move around the bedroom as he testified, or whether the mattress could not have slipped off the bed in the manner described by Prince, as the defendant testified, the officers cannot be said to have had a lawful right of access to items concealed in the clothing and toys piled on the child's bed. There was no reason to search the child's bed in order to find the defendant nor was there any need to move the bed in order to find the defendant. He had been found, arrested and removed from the bedroom before Prince entered. Under the circumstances, the gun cannot reasonably be said to have been in plain view when Prince discovered it. *Harris v. United States*, 390 U.S. 234 (1968), upon which the government relies, is distinguishable. The evidence in that case was located in plain view when the police undertook a search of an impounded car "to protect the car while it was in police custody." *Id.* at 236. No analogous circumstance was present in the Bell apartment after the defendant had been arrested.

The government also contends that the seizure of the gun was incident to the lawful arrest of the defendant. Government's Post-Hearing Brief at 10-11.

> When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his

> immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

United States v. Chadwick, 433 U.S. 1, 14 (1977) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). Here, the government has made no showing that the gun at issue, concealed under piles of clothing and toys on the child's bed, was within the defendant's immediate control at the time of his arrest. The defendant was found under another bed, albeit a bed located very close to the child's bed, but the physical mechanism by which he might have gained possession of the gun from that position, or even while being handcuffed, is not apparent.[1]

The government has cited opinions from the Sixth, Ninth and District of Columbia courts of appeals which it asserts "upheld searches conducted after the defendant was handcuffed and removed from the area," Government's Post-Hearing Brief at 11, but that characterization of those cases is not completely accurate and each case is distinguishable on its facts in any event. In *United States v. Abdul-Saboor*, 85 F.3d 664 (D.C. Cir. 1996), when officers arrived at the defendant's apartment to arrest him, he appeared at the door wearing a bathrobe, *id*. at 666. He was given permission to change clothes and entered his bedroom, where the officers observed him picking up a handgun and trying to hide it in front of his body. *Id*. He was then ordered at gunpoint to drop the gun, after which he was handcuffed and seated in a chair a few feet outside the bedroom door. *Id*. One officer then went into the bedroom and found a pistol and ammunition, which he seized. *Id*. After the other officer had made a trip to their car to request assistance and returned, the officer again went into the bedroom and found crack cocaine; he then found other weapons and more cocaine in other rooms in the apartment. *Id*. The court upheld the seizure of the drugs and weapons found during and after the officer's second entry into the bedroom as incident to the arrest, emphasizing that the defendant "had demonstrated both the

[1] Because the issue is not raised by the evidence or by the parties, I express no opinion on the question whether the outcome in this case would differ had such evidence been presented.

capacity and the desire to avoid arrest" and the fact that the defendant, while handcuffed, was still in the apartment and able to "run a few feet to the bedroom and seize a deadly weapon." *Id*. at 670.

In *In re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998), the same court discussed *Abdul-Saboor* in reaching its conclusion that the search of a bedroom adjacent to the one in which the defendant had been arrested was justified as a protective sweep, *id*. at 769-70. In the second case, the defendant had been observed by passing police officers apparently breaking into a house. *Id*. at 762. The defendant did not respond to the repeated announcements of one of the officers that police were present, tried to prevent the officer from entering the house and then ran upstairs in the dark house, into a bedroom where he was arrested. *Id*. at 762-63. The defendant was then taken downstairs and left in the custody of other officers but not handcuffed. *Id*. at 763. The first officer then returned to the first bedroom, where he found crack cocaine and a handgun; following this discovery, he went back downstairs and handcuffed the defendant. *Id.* He then returned upstairs and in a small bedroom adjacent to the first found cocaine and a triple-beam scale. *Id*. The court again held that the search of the first bedroom was incident to arrest because the area searched was reasonably accessible to the defendant at the time of the search. *Id*. at 768-69. It upheld the search of the second bedroom as a protective sweep because it was an area immediately adjoining the place of arrest from which an attack could immediately be launched. *Id*. at 770. In the case at hand, the bedroom was not reasonably accessible to the defendant at the time of the search and there is no evidence that could possibly support a conclusion that an attack against the officers could immediately be launched from that room.

In *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996), the defendant was arrested, along with others, handcuffed and removed from the house while the officers continued a security sweep of the house, *id*. at 1413. After the sweep was completed, an officer returned to the bedroom where the

defendant had been found and opened a rifle case that had been seen at the defendant's feet when he was arrested. *Id*. at 1413 & 1420. Noting that a search may be conducted shortly after an arrestee has been removed from the area if the search is restricted to the area that was within the arrestee's immediate control when he was arrested and if events occurring after the arrest but before the search did not render the search unreasonable, the court held that the rifle case had been well within the defendant's reach at the time of the arrest "and thus constituted a potential danger to the arresting officers," so that it was seized lawfully during a search incident to arrest. *Id*. at 1419-20. As I have already noted, the gun in this case, which could not have been seen at the time of the defendant's arrest, has not been shown to have been within his reach at that time.

Finally, in *Davis v. Robbs*, 794 F.2d 1129 (6th Cir. 1986), officers who responded to a taxi driver's complaint that the defendant had refused to pay him observed the defendant inside the front door of his house with a rifle, *id*. at 1130. The defendant then stepped outside and in response to a police request to surrender the rifle stated "I'll kill you." *Id*. The defendant returned to his house and was observed placing the rifle against a table, opening and closing a pocketknife and placing the knife in his pocket. *Id*. Officers then entered the house and the defendant was arrested, handcuffed and placed in a police car. *Id*. An officer then entered the house and took the rifle from its position against the table. *Id*. The court held that the rifle was seized in the course of a lawful search incident to arrest under *Chimel* due to the defendant's proximity at the time of his arrest to the loaded rifle "which was in clear view and easily accessible to him." *Id*. at 1131. In this case, the handgun was not in clear view and the government has not shown that it was easily accessible to the defendant at the time of his arrest.

The government's final argument concerning the gun is that the defendant may not challenge the seizure of the gun because he had no reasonable expectation of privacy in the gun or in the child's bed.

Government's Post-Hearing Brief at 11-12. "Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims." *United States v. Padilla*, 508 U.S. 77, 82 (1993). The defendant bears the burden of proving that he had a legitimate expectation of privacy in the area searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). Here, the defendant has provided sufficient evidence to prove that he had a legitimate expectation of privacy in the apartment, which he testified was his primary residence at the time of the arrest. *See generally Minnesota v. Olson*, 495 U.S. 91, 98-100 (1990). The government's focus on the child's bed[2] itself unduly narrows the scope of the required expectation of privacy. It is not the facts that the child's bed was only used occasionally, that the defendant was not the father of the child or that the defendant did not testify that he cared for the child when she was present, Government's Post-Hearing Brief at 12, that is determinative. Particularly where, as here, the individual piece of furniture in which the gun was hidden was located in the defendant's bedroom, it is not necessary to parse the actual use of the child's bed in order to conclude that the defendant may have the benefit of a reasonable expectation of privacy under the circumstances.[3]

The government's argument concerning the gun itself presents a closer question. If the defendant could truly be said to have disavowed any ownership or control of the gun, he might well not be able to challenge its seizure. *See, e.g., United States v. Starks*, 193 F.R.D. 624, 628-29 (D. Minn. 2000); *United States v. Lewis*, 816 F. Supp. 789, 793 n.2 (D. Mass. 1993). However, that was not the case here. While the defendant's testimony on the point was less than uniform, he did state that he bought the gun, Tr. at 82, that he had fired the gun to test it, *id*. at 86, that he had access to the gun at any time, *id*. at 86-87, that he was involved in the plans to purchase ammunition for the gun, *id*. at 87,

[2] The child was three years old at the time of the arrest. Transcript of Hearing on Defendant's Motions to Suppress Evidence ("Tr.") (Docket No. 23) at 77.

[3] In this regard, *see also United States v. Muniz-Melchor*, 894 F.3d 1430, 1436 (5th Cir. 1990) (fact that defendant has concealed (*continued on next page*)

and that he gave a package of ammunition to Nicole Boutot to hold for him, *id*. When asked "[D]id [the gun] belong to you," the defendant responded "Not in — not in like that way, but yes." *Id*. at 82. This is sufficient evidence of possession to allow the defendant to challenge the seizure of the gun.

The defendant's motion to suppress the gun should be granted.

C. Motion to Suppress the Ammunition

With respect to the ammunition seized on June 30, 2002, the government contends that the defendant lost any reasonable expectation of privacy in Bell's apartment after his arrest because his conditions of bail prohibited him from returning there, he abandoned the ammunition, the ammunition on the back porch could be legally seized as a risk to public safety and Bell, who was not a government actor, voluntarily turned over the ammunition that was in the apartment. Government's Post-Hearing Brief at 12-14. The defendant responds that he "maintained the apartment as his residence" after his arrest and that the ammunition is "fruit of the poisonous tree" under *Silverhorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Defendant's Supplemental Motion to Suppress at 1-4; Defendant's Post-Hearing Brief at 12.

The government's arguments concerning the defendant's expectation of privacy and abandonment must be considered first, because a defendant who has no reasonable expectation of privacy in the premises from which the evidence at issue was seized or who has abandoned the evidence at issue may not raise a challenge to admission of the evidence under the "fruit of the poisonous tree" doctrine. *See United States v. Soule*, 908 F.2d 1032, 1036-37 (1st Cir. 1990).

Not surprisingly, the government cites no authority in support of its argument that the defendant lost any reasonable expectation of privacy in the apartment that he clearly considered to be his home by virtue of a condition of bail that prevented him from returning to the apartment. The First Circuit

---

item at issue is some evidence of expectation of privacy). Here, the gun had been concealed under piles of toys and clothing.

has described a reasonable expectation of privacy for purposes of a Fourth Amendment challenge as follows:

> We have often catalogued the sort of factors which are pertinent to this threshold inquiry: ownership, possession, and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case. We look, in short, to whether or not the individual thought of the place (or the article) as a private one, and treated it as such. If the movant satisfies us on this score, we then look to whether or not the individual's expectation of confidentiality was justifiable under the attendant circumstances.

United States v. Aguirre, 839 F.2d 854, 856-57 (1st Cir. 1988) (citations omitted). The condition of the defendant's bail in this case has little or nothing to do with these factors. The evidence establishes that the defendant continued to consider the apartment his primary residence and reasonably continued to expect privacy in the apartment.

The government's abandonment argument is similarly based on the bail condition and the fact that the defendant "made no effort to retrieve" the ammunition in the five days between the imposition of the bail condition and the seizure of the ammunition. Government's Post-Hearing Brief at 13. An act of abandonment may extinguish a Fourth Amendment claim under certain circumstances. *Untied States v. Sealey*, 30 F.3d 7, 10 (1st Cir. 1994). However, mere inability to return to the premises where the evidence at issue was located, without more, does not constitute abandonment of the evidence. *United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970) (adding that "where . . . the party's absence from the premises is involuntary because of his arrest and incarceration, the government should bear an especially heavy burden of showing that he intended to abandon them"). Here, the fact that the defendant did not seek to retrieve the ammunition in the five days after his arrest is fully consistent with an intent not to abandon the ammunition; if he continued to consider the apartment his residence and had a reasonable expectation of privacy in the apartment, with no intent to

move permanently to another residence, there was no reason to "retrieve" the ammunition during those five days. The government has not established that the defendant abandoned the ammunition.

The government next argues that no governmental seizure of the ammunition occurred because it was turned over voluntarily by Bell, who was not coerced or directed by the police to do so. Government's Post-Hearing Brief at 12-13. This argument has some initial appeal under *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), in which the Supreme Court upheld the introduction into evidence of a shotgun produced by the defendant's wife to police who questioned her in the defendant's absence concerning the night on which the crime occurred, *id*. at 446, 487-90. However, there are significant differences that distinguish this case from *Coolidge*. Unlike the questioning officers in *Coolidge*, who were not aware of the presence of the guns in the house, *id*. at 446, Hatfield knew that the gun that generated one of the present federal charges against the defendant had been seized from Bell's apartment before he interviewed her and it was his question whether she knew anything about that gun that led to her giving the .25 caliber ammunition to Hatfield and telling him about the .22 caliber ammunition on the porch. Thus, the ammunition could only have "been come at by exploitation of" the seizure of the gun, and, since that seizure was illegal for the reasons already stated, the ammunition must also be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The government has made no attempt to show that the ammunition was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Id*. The government cannot avoid application of this "fruit of the poisonous tree" doctrine by the fortuitous circumstance that a private party actually produced the tainted evidence, when that production itself was stimulated, for all that appears, only by the illegal seizure that caused the taint. For the same reason, the government's argument that the seizure of the .22 caliber ammunition was justified because it created a safety risk by its presence on the porch, where it was "accessible to any adult or child who passed by,"

Government's Post-Hearing Brief at 14, must also fail. First, Hatfield only learned of the presence of the ammunition on the porch by asking Bell what she knew about the gun. Second, the evidence falls far short of establishing that Hatfield "had a reasonable basis to believe that a threat to safety existed of an urgency and magnitude that would justify a warrantless search" at the time. *United States v. Lopez*, 989 F.2d 24, 26 (1st Cir. 1993). Such a showing would require, at a minimum, a description of the location of the ammunition on the porch and its visibility to passersby as well as a description of the container or containers in which the ammunition was found, so that the court could determine whether it would be recognizable to passersby as ammunition. No such evidence was provided here.

The motion to suppress the ammunition should be granted.

D. Motion to Suppress Statements

The defendant contends that his statements made on July 3, 2002 should also be suppressed as fruit of the poisonous tree. Defendant's Post-Hearing Brief at 15. The government contends that the statements "were sufficiently attenuated so as to purge any taint" from the unlawful seizures of the gun and ammunition. Government's Post-Hearing Brief at 14. The defendant does not respond to this argument. The question whether inculpatory statements are sufficiently attenuated so as to remove them from the purview of the "fruit of the poisonous tree" doctrine "must be answered on the facts of each case. No single fact is dispositive." *Brown v. Illinois*, 422 U.S. 590, 603 (1975). Factors to be considered include whether *Miranda* warnings were given, the temporal proximity of the arrest and the statement, the presence of intervening circumstances "and, particularly, the purpose and flagrancy of the official misconduct." *Id*. at 603-04. The burden of showing admissibility rests on the government. *Id*. at 604.

"Under Supreme Court precedent, the weakness of the causal connection, delay in discovery, and lack of flagrancy in the violation and like considerations may persuade a court that — even though

some causal link may exist — a remote 'fruit' should not be suppressed." *United States v. Hughes*, 279 F.3d 86, 89 (1st Cir. 2002).

Here, the defendant was given his *Miranda* rights before making the statements in question. Affidavit of Christopher J. Durkin (Gov't Exh. 2) ¶ 5. The government contends, correctly, that the violation involved in the discovery of the gun was not flagrant. Government's Post-Hearing Brief at 15. These factors counsel against suppression. Prince's purpose in the conduct that led to the discovery of the gun, according to Prince, was merely to provide more room for officers to move around in the bedroom; however, the need for officers to move around in the bedroom only arose because they were engaged in a search of the room that, under the circumstances discussed above, was not warranted. This factor weighs somewhat in favor of suppression and against application of the attenuation doctrine.

The government lists the following intervening circumstances, although it fails to note that in order to provide a basis for application of the attenuation doctrine, those circumstances must break the causal chain from the illegal search or arrest to the statement or confession, *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972):[4] "Paradis was taken to jail on the outstanding warrants and released on bail . . .[;] . . . Bell called the police back to her apartment because Paradis had stolen her car[;]. . . [Bell] . . . talk[ed] to Officer Hatfield again about the firearm and ammunition[;] . . . Officer Hatfield obtained an arrest warrant charging Paradis with being a felon in possession[;] . . . Paradis was arrested the following day." Government's Post-Hearing Brief at 14-14. In *Johnson*, the intervening event that broke the causal chain between an illegal entry and arrest and an identification of the defendant in a lineup, which was the evidence to be introduced against him at trial, was his appearance before a magistrate, so that he was in custody under the authority of that commitment rather than the arrest at the

[4] *Johnson v. Louisiana* is the case cited by the Supreme Court in *Brown* as authority for listing "the presence of intervening (*continued on next page*)

time of the identification. 406 U.S. at 365. None of the events listed by the government establishes a path to the statements that did not go through the discovery of the gun. *Hughes*, 279 F.3d at 89. Nor do those of these events that have any causal relationship to the statement lack a connection with the discovery of the gun. *Id*. at 90.

The first listed event, the defendant's arrest on the outstanding warrants and transport to jail, has no discernable causal relationship to his later statements concerning the gun. The second listed event, the fact that Bell called police to her apartment on a later date, standing along, has no causal relationship to the defendant's later statements. Thus neither of these events can serve to break the causal chain between the discovery of the gun and the defendant's statements. The government has made no showing that the remaining events occurred independently of the discovery of the gun; indeed, the evidence can only reasonably be interpreted to provide support for the opposite conclusion. Bell did not talk to Hatfield about the ammunition or the gun until he asked her about the gun; he only knew about the gun because Prince had discovered it in the apartment after the arrest. Hatfield only obtained the arrest warrant because the gun had been found. The defendant was only arrested because the gun had been found. The intervening-event factor weighs in favor of the defendant.

The government's argument concerning the factor of temporal proximity is that "the interview occurred eight days after the firearm was discovered, and three days after Bell turned over the ammunition." *Id*. at 14. In *Wong Sun*, when the defendant returned voluntarily "several days" after the arrest at issue, the Supreme Court found that "the connection between the arrest and the statement had become so attenuated as to dissipate the taint." 371 U.S. at 491 (citation and internal quotation marks omitted). Circuit courts other than the First Circuit have held that periods as short as six days between an illegal search and a confession may purge the taint of the search. *E.g., United States v. Patino*, 862

---

circumstances" as one of the factors to be considered in this regard. 422 U.S. at 603-04.

F.2d 128, 133 (7th Cir. 1988). All other things being equal, this factor would weigh in the government's favor in this case.

All other things are not equal, however. The "causal connection," as that term is used in *Hughes*, is anything but "weak" in this case. The government has not shown that the defendant's arrest on the gun possession charge, following which he gave the statement at issue, has a causal connection to anything other than the discovery and seizure of the gun in the first place, in light of the fact that Bell's statements and proffer of the ammunition were elicited by direct questioning about the gun. The strength of the causal connection outweighs the other *Brown* factors under the circumstances of this case. The defendant's motion to suppress his statements should be granted.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress the search warrant (Docket No. 10) be **DENIED** and that the defendant's motions to suppress the gun, ammunition and statements made on July 3, 2002 (Docket Nos. 11, 12 and 21) be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of February, 2002.

_____

David M. Cohen
United States Magistrate Judge

ZACHARY A PARADIS (1)
defendant

WILLIAM MASELLI, ESQ.

LAW OFFICE OF WILLIAM MASELLI
98 COURT STREET
AUBURN, ME 04210
(207) 783-4800

STEPHEN M. BROCHU, ESQ.

LAW OFFICE OF WILLIAM MASELLI